August 5, 2004

To: Board of Governors of the Federal Reserve System and other agencies of the Federal Financial Institutions Exaniination Council (FFIEC)

c/o Jennifer J. Johnson, Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

And

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corp.
550 17th Street, N.W.
Washington, DC 20429

Re: Docket Number: OP-1198; and R- 1197

BancorpSouth, through the undersigned, appreciates the opportunity to comment by this one submission on both the proposed rule amendment to Regulation DD referenced above as well as the proposed Interagency Guidance on Overdraft Protection. BancorpSouth operates a system of community banks in six states, Mississippi, Alabama, 'Tennessee, Louisiana, Arkansas and Texas, with approximately 260 deposit-taking locations. BancorpSouth also has a system of ATM's and the availability of electronic banking. The undersigned is a Vice Chairman of BancorpSouth responsible for supervising the bank's operations division, which includes the deposit functions associated with checking accounts, insufficient funds items, returned items, and overdrafts.

BancorpSouth offers these comments, out of an abundance of caution, in that it firmly believes its system and procedures for managing NSF and OD items is lawful in all respects as a discretionary service, but for which the proposed rule and proposed guidance leave some doubt in terminology, tenor and unintended consequences. BancorpSouth therefore desires to make two strong initial points, followed by specifics tied to the respective proposals.

If one could glean an overriding theme to the two proposals from a reading of both in their entirety, it would be concern over (a) *marketing* of overdraft protection programs and (b) *automation* tied to the NSF/OD function. The latter reference is one which is the most unfortunate and for which there needs to be clarification. The former simply needs some definition and clarification to clearly segregate financial institutions, such as BancorpSouth, who choose not to actively market such a service, while at the same time, may be choosing to take advantage of modern technology to otherwise replace or supplement a function traditionally addressed manually.

Simply put, the terminology utilized in these proposals needs consistency and "bright line" definitions. What needs to be made abundantly clear is that the proposed guidance and rule are only relevant to those financial institutions who choose to actively promote some form of overdraft protection program and not innocently capture in that web banks who now utilize the wonders of technology to assist the former human task of daily approvals of payments versus returns. In other words, just because a prior traditional and discretionary service was "hands on" but now utilizcs automation does not now make it offend notions different than the traditional service historically offered by banks for years.

When the first paragraph was reviewed of the proposed Reg DD rule, R-1197, in its summary preamble, Part II which announces Concern About Bounced-Check Protection Services, the undersigned thought aloud "this is us". It states:

> Over the years, some institutions automated the process for considering whether to honor overdrafts to reduce the costs of reviewing individual items, but generally institutions did not inform customers of their internal policies for determining whether an item would be paid or returned.

Then, this same opening paragraph of the R-1197 proposal draws the contemporary distinction between the entry into the marketplace of third party vendors by highlighting the key distinguishing characteristic:

> What generally distinguishes the vendor programs from institutions' in-house automated processes is the addition of *marketing plans* that appear designed to *promote* the generation of fee income by setting a dollar amount that consumers would be allowed to overdraw and by *encouraging* consumers to overdraw their accounts and use the service as a line of credit. (Emphasis added).

After reading this initially expressed concern, we fully expected the proposed regulatory proposals to track this initial lead-off concern. Yet, the undersigned quickly discovered a commingling of terms with lack of clarity related to what constitutes "marketing", what constitutes a "program" what constitutes an "automated service," and what does one make of other "automated" references. In other words, what the proposal later describes to be of "general

applicability" has no corresponding concern expressed or attached to it in the above quoted preamble.

We therefore urge that the proposals be revisited, the focus returned to the concerns expressed and not those of general applicability. To do otherwise will create irreconcilable differences and incongruities tied to requirements of additional disclosures and other mandates when the concern expressed never even relates to traditional internal policies and non-disclosed (even if automated) processes.

Rather than a credit offer or product, BancorpSouth offers a deposit service that we respectfully submit most, if not all, deposit institutions offer via their "signature card" account agreements, supplemented by the Uniform Commercial Code on bank deposits. Simply put, our agreements provide that we may, in our sole discretion, pay *or* return a check or other item that is presented against insufficient funds.

Historically, the decision to pay or not pay an item usually fell on the "who did you know" test between our bank and its customer, a process which might have resulted in otherwise "good" customers, (but less likely known to an individual banker), having their items returned and not paid, when, if "personally known", this discretionary service might have been otherwise extended to them. Enter technology. BancorpSouth now utilizes software which can review account statistics, activity and other factors, and guide BancorpSouth by automated means (not ""automatically"). Use of automation by us does not mean final decision or commitment, just access to an automated tool to assist in making the return or pay decision.'

Thus, the proposals periodic reference to "automation" (and more importantly a direct reference to an undefined term "automated overdraft service") needs to be dropped from the proposal with the appropriate focus, if the agencies proceed to go forward with this rule and guidance, returned to inappropriate marketing and promotion of what is otherwise a legitimate and traditional deposit service. "Automation," if it means utilization of technology, is an unfortunate extension of the guidance and proposed rule which is unwarranted with only marketing being appropriate for perhaps guidance, not technology.

Even with this "return to focus", the "marketing" prong of the proposals needs significant clarification, as well. BancorpSouth engages in no marketing whatsoever of what is otherwise

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'Even when part of our payment or return process is "automated", our institution always retains the discretion to reject that computer guidance and pay or return an item. And even though "automated", be it collectively, individually, system-wide, regionally, branch-to-branch, account-to-account, day-to-day, month-to-month, or otherwise, we may change (and *do* change) at *any* time *any* of the criteria the software uses to make the discretionary determination of whether to pay or return an item. The software merely assists in analyzing risk tolerance levels, generating reports and making analytical "judgments", all of which rely on ever evolving sources of information, from any number of sources, be it direct, indirect, financial based, history based, or otherwise, to either decline to pay overdrafts or pay them.

"behind the scenes" ever changing risk based technology, designed to supplement an occasional and discretionary service. No advertisements are used; no limits are disclosed; the circumstances under which the institution pays or returns an item is not disclosed (not only from no marketing, but to avoid a confusing and all but impossible practical problem). All the while, our truth in savings obligations to disclose relevant fees and charges associated with checking accounts, including NSF and OD fees, are met.

Whether the agencies determine that active and affirmative marketing of an overdraft "product" needs regulation or not, institutions such as ours who choose to never market an occasional and periodic customer friendly service should not be left to guess whether a new rule or new guidance will apply to them. Instead, a clear demarcation between the active promoters of such services and those in the category of the BancorpSouths of the world needs to be made. Thus, the BancorpSouth position is rather straight-forward: drop the guidance on best practices altogether or alternatively make certain and unequivocal that the "target" is marketers of aggressive overdraft programs, not those who choose not to market, regardless of whether automation/technology is used or not. Then, under the Reg DD proposal, tailor make it with "bright line" rules to avoid inconsistencies because the current laws and regulations already govern this topic extensively and adequately.

The undersigned has chosen to address both the Reg DD proposed rule and the proposed guidance in one comment letter because it is respectfully submitted, they cannot be reconciled separately. If at all, Reg DD is indeed the place where such regulation is warranted and the proposal is reasonably targeted and reasonably concise. Yet it is difficult to square the Reg DD proposal's statement per the Regulatory Flexibility Act that "no federal rules duplicate, overlap, or conflict with the proposed revisions to Regulation DD" when the proposed guidance under the legal risk category has a laundry bag list of other laws potentially implicated.

Thus, having met above the primary issues for this comment, marketing and automation, for what BancorpSouth perceives as generic or "generally applicable" proposed rules and guidance for NSF/OD items *regardless* of their marketed or automated aspects, the following specific comments are warranted (led off by the premise that for those who do not market, these proposals and guidances should not even apply).

Specific Comment on the Proposals

Proposed Reg DD, Rule R-119:

1. Any proposed revisions to Regulation DD that would require additional fee and other disclosures should be limited to marketed, promoted, and disclosed overdraft protection programs, defined as such.

2. **A.** The proposed amendments of general applicability are either not required or covered under existing Reg DD, and should be abandoned.

B. If however, these comments are rejected and "general applicability" rules are issued,

please consider the following:

Periodic Statements. We believe our customers are already adequately advised of both NSF and OD fees as we already incur a significant expense to inform our customers via mailing NSF/OD notices, sending collection notices, making follow up inquiries to collect items and fees, and by sending currently existing monthly statements showing each NSF/OD charge, the items to which they relate, and daily balance information Since our institution, as do most, already provide NSF and OD information in a detailed format that allows our customers to compute monthly and year-to-date information if they so desire, including the always appropriate admonition to "reconcile their bank statements," it is our customers who should be cognizant of never writing a check when sufficient funds are not available.

Additionally, there are many customers through other plans of our bank who authorize NSF debits every month, even though we do not market an overdraft program. Thus, this information applicable "generally" would be inconsistent with those plans. Also, if the disclosure becomes a legal requirement, data processing costs will increase, vendors will consider the change as "maintenance", resulting in unnecessary expense. The requirements for including the total amount of fees imposed for overdrafts and returned items for a statement period and calendar year should therefore be deleted. Alternatively, we ask the board to reconsider such a costly and burdensome change.

Initial Account Disclosure. The requirement for additional content in account disclosures is unnecessary for the BancorpSouth system of addressing overdrafts. The conditions under which a fee will be imposed, be it NSF or OD fee, is irrelevant because the fees are the same. Again, it is the customer who should know if sufficient funds exist in an account or not. Whether BancorpSouth, (utilizing technology or human means) decides to exercise its discretion and pay an item versus returning it would create an almost impossible disclosure obligation. Whether a check is paid or not, there is no difference in fees so tied to a certain account or with our bank for comparison shopping purposes, the goal of Reg DD. If we exercise discretion related to a specific item, this is not a feature available to everyone who opens an account with us, thus, Reg DD's proposal in this regard should be abandoned.

Advertising. Since the target of the rule proposal and guidance appears to be those who actively market such a service to "encourage" overdrafts, BancorpSouth offers no specific comment, other than the need for clear definition demarcation between true marketers as opposed to otherwise required or innocent communication with customers that should not be caught up in the web of these otherwise burdensome disclosures. We therefore recommend the board consider a clear marketing only oriented definition of advertising which would exempt educational and informative information and other non-promotional communications about overdrafts and fees. BancorpSouth will follow and meet existing laws and never knowingly violate anything which could constitute an unfair or deceptive trade practice, but we should be relieved of the concern over the substantial cost of "do we have to comply with the advertising rules?" when it is not (or should not be) substantively applicable to BancorpSouth.

Best Practices Guidance: D-1198.

Rather than specifics, some fundamentals warrant mention in addressing these "best practices" proposals. Since "best practices" do indeed become the standard for the courts, the norm for examiners, and a potential sword to plaintiffs' lawyers, extreme caution should be used with this or any "guidance". Thus, these basics.

'She Uniform Commercial Code does not require our bank to pay a check against insufficient funds. Any commitment on our part to do so comes solely from specifically tailored products, *in writing,* to draw on a line of credit, a credit card, or savings account to "cover" otherwise insufficient items. Further, the UCC allows our bank to pay items in any order and it need not necessarily be pre-determined or disclosed (there could be 20 to 30 different scenarios on any banking day which would determine order of payment, the descriptions of which to a customer would be overwhelming, confusing and of little value). Further, we purposely avoid a variance in the fee we charge for items paid (OD fees) and items returned (NSF fees),[2] both being exactly the same $29.00 fee in order to avoid any conceivable implication that the fees are for an extension of credit rather than handling of the items in question.

With this additional background on BancorpSouth, submitted to be quite common in the industry, we simply believe that our system better addresses customers who mistakenly or even knowingly issue a debit against insufficient funds. They have a preference that we pay the item. Nowhere in the proposed guidance is this expected deposit Customer preference mentioned. Thus, we believe the proposed guidance will have the unintended consequence of being consumer unfriendly, rather than promote consumer protection.

Why? When our bank chooses to pay an item against insufficient funds, indeed we charge an OD fee. However, no third party is otherwise aware that the check was written against insufficient funds. There are no other consequences, fees, or expenses to our customer. On the other hand, when we utilize our discretion to return an item, indeed we charge the same dollar fee, in this instance an NSF fee, but our customer may also be charged a return check charge by a merchant, may have negative reporting via one or more of the check services used by the merchant, be subject to one or more civil claims, or face "bad check" civil or criminal provisions. All of which points out differences to the customer, but for which our bank has no "difference" nor financial incentive to pay the item versus return it because the same $29.00 fee is charged in each instance.

In conclusion, with an overdraft item, we simply pay it as a courtesy extended to our customers, a decision made either informally, individually, or via decision based "human" factors or technology/automated based analysis either way, all of this is transparent and unknown to our customers, intended to be objective, but without technological assistance, may be inconsistent

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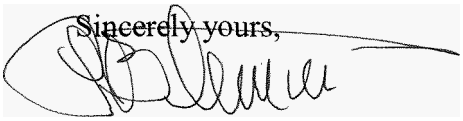
'We choose to utilize terminology which we believe is consistent in the industry (and for which ask the agencies to also use, namely, "insufficient funds fee" (NSF) for a check which is not paid and returned and "overdraft fee" (OD fee), for a check which is not returned and paid into overdraft.)

under like circumstances. Thus, a fundamental key to the proposals, otherwise intended to be customer and consumer friendly, is a "missing of the point" that overdrafts are not the problem. Customers authorizing payments or writing checks when they do not have the money is the problem and where responsibility should always remain.

Sincerely yours,



Larry Bateman, Vice Chairman
BancorpSouth